

SENATE BILL NO. 461

INTRODUCED BY J. BRUEGGEMAN

A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING A PUBLIC OR PRIVATE ENTITY THAT PROVIDES WATER TO A MUNICIPALITY, A REGIONAL WATER AUTHORITY, OR A COUNTY WATER AND SEWER DISTRICT TO CHANGE THE PLACE OF USE OF A WATER APPROPRIATION RIGHT WITHOUT PRIOR APPROVAL UNDER CERTAIN CIRCUMSTANCES; AND AMENDING SECTION 85-2-402, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights -- definition. (1) (a) The right to make a change in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15), ~~and (16), and (18)~~ of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(c) As used in this part, "national forest system lands" has the same meaning as that provided in 85-20-1401, Article I.

(2) Except as provided in subsections (4) through (6), (15), ~~and (16), and (18)~~ and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water

rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to 85-2-436 or a temporary change in appropriation right authorization pursuant to 85-2-408 or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

(a) the criteria in subsection (2) are met; and

(b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use must

1 be based on a consideration of:

2 (i) the existing demands on the state water supply, as well as projected demands for water for future
3 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
4 protection of existing water rights and aquatic life;

5 (ii) the benefits to the applicant and the state;

6 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

7 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
8 made;

9 (v) the effects on private property rights by any creation of or contribution to saline seep; and

10 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
11 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

12 (5) The department may not approve a change in purpose of use or place of use for a diversion that
13 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed
14 unless:

15 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in
16 subsections (2) and (4) are met; and

17 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then
18 petitions the legislature and the legislature affirms the decision of the department after one or more public
19 hearings.

20 (6) The state of Montana has long recognized the importance of conserving its public waters and the
21 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
22 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
23 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
24 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
25 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before
26 out-of-state use may occur:

27 (a) The department and, if applicable, the legislature may not approve a change in appropriation right
28 for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator
29 proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public
30 hearings that:

1 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
2 subsection (2) or (4) are met;

3 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

4 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
5 of Montana.

6 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
7 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature
8 shall consider the following factors:

9 (i) whether there are present or projected water shortages within the state of Montana;

10 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
11 transported to alleviate water shortages within the state of Montana;

12 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
13 use the water; and

14 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
15 water.

16 (c) When applying for a change in appropriation right to withdraw and transport water for use outside
17 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
18 appropriation and use of water.

19 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
20 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change
21 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with
22 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
23 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
24 determines that the proposed change in appropriation right might adversely affect the rights of other persons.

25 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject
26 to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this
27 section, including limitations on the time for completion of the change in appropriation right. The department may
28 extend time limits specified in the change in appropriation right approval under the applicable criteria and
29 procedures of 85-2-312(3).

30 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the

1 appropriator shall notify the department that the appropriation has been completed. The notification must contain
2 a certified statement by a person with experience in the design, construction, or operation of appropriation works
3 describing how the appropriation was completed.

4 (10) If a change in appropriation right is not completed as approved by the department or legislature or
5 if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied
6 with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why
7 the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show
8 sufficient cause, the department may modify or revoke the change in appropriation right approval.

9 (11) The original of a change in appropriation right approval issued by the department must be sent to
10 the applicant, and a duplicate must be kept in the office of the department in Helena.

11 (12) A person holding an issued permit or change in appropriation right approval that has not been
12 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an
13 application for change in appropriation right pursuant to this section.

14 (13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent,
15 agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change
16 in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent,
17 officer, or employee, attempt to change an appropriation right except in accordance with this section.

18 (14) The department may adopt rules to implement the provisions of this section.

19 (15) (a) An appropriator may change an appropriation right for a replacement well without the prior
20 approval of the department if:

21 (i) the appropriation right is for:

22 (A) ground water outside the boundaries of a controlled ground water area; or

23 (B) ground water inside the boundaries of a controlled ground water area and if the provisions of the
24 order declaring the controlled ground water area do not restrict a change in appropriation right;

25 (ii) the change in appropriation right is to replace an existing well and the existing well will no longer be
26 used;

27 (iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of
28 the well being replaced and do not exceed:

29 (A) 450 gallons a minute for a municipal well; or

30 (B) 35 gallons a minute and 10 acre-feet a year for all other wells;

1 (iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated
2 from the well being replaced; and

3 (v) a timely, correct, and complete notice of replacement well is submitted to the department as provided
4 in subsection (15)(b).

5 (b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the
6 appropriator shall file a notice of replacement well with the department on a form provided by the department.

7 (ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a
8 change in an appropriation right if all of the criteria in subsection (15)(a) have been met ~~and the notice is correct~~
9 ~~and complete.~~

10 (B) If the replacement well is located on national forest system lands, the notice is not correct and
11 complete under this subsection (15) until the appropriator has submitted proof of any written special use
12 authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of
13 constructing the replacement well.

14 (iii) The department may not issue an authorization of a change in appropriation right until a correct and
15 complete notice of replacement well has been filed with the department. The department shall return a defective
16 notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a
17 corrected and completed notice of replacement well within 30 days of notification of defects or within a further
18 time as the department may allow, not to exceed 6 months.

19 (iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

20 (A) cease appropriation of water from the replacement well pending approval by the department; and

21 (B) submit an application for a change in appropriation right to the department pursuant to subsections
22 (1) through (3).

23 (c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under
24 85-2-404.

25 (d) For each well that is replaced under this subsection (15), the appropriator shall follow the well
26 abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to
27 37-43-202.

28 (e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right
29 that meets the requirements of subsection (15)(a).

30 (16) (a) An appropriator may change an appropriation right without the prior approval of the department

for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:

(i) withdraws water from the same ground water source as the original well; and

(ii) is required by a state or federal agency.

(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this subsection (16).

(17) The department shall accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit the fishery resource pursuant to 85-2-436 and this section.

(18) (a) A public or private entity that provides water to a municipality, a regional water authority, or a county water and sewer district may change the place of use of an appropriation right for municipal use to correspond to its municipal water service area without the prior approval of the department if:

(i) no other changes are made to the appropriation right, including but not limited to flow rate and volume; and

(ii) a timely, correct, and complete notice of the change of appropriation right is submitted to the department as provided in subsection (18)(b).

(b) (i) After the change in the place of use of an appropriation right is made, the appropriator shall file a change of appropriation right notice on a form provided by the department.

(ii) The department shall review the notice and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (18)(a) have been met.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice has been filed with the department. The department shall return a defective notice to the

1 appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and
2 completed notice within 30 days of notification of defects or within an additional amount of time as the department
3 may allow, not to exceed 6 months."

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